IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	
	:	
-v-	:	CR 00-S-0422-S
	:	
ERIC ROBERT RUDOLPH,	:	
Defendant	:	

UNITED STATES'S PRE-HEARING SUBMISSION REGARDING RUDOLPH'S FRANKS CHALLENGE TO SEARCH WARRANT 2:98-M-08

Comes Now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama and Michael W. Whisonant and William R. Chambers, Jr., Assistant United States Attorneys, and R. Joseph Burby, Special Assistant United States Attorney, and respectfully files this Pre-Hearing Submission Regarding Rudolph's Franks Challenge to Search Warrant 2:98-M-08.

During the October 13, 2004, status conference, the Court scheduled an evidentiary hearing on Rudolph's suppression motions, including Rudolph's Motion to Suppress Evidence Relating to Search Warrant 2:98-M-08. During the conference, the Court recognized that Rudolph has raised a challenge to Search Warrant 2:98-M-08 pursuant to Franks v. Delaware, 438 U.S. 154 (1978), and observed that the Court

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typically hears argument from the parties regarding the defendant's ability to make the required substantial showing before opening an evidentiary hearing on a Franks claim. To assist the Court in this regard, the United States respectfully submits this written summary of the argument that will be presented at the Suppression Hearing. As stated below, Rudolph has failed to make the showing required to hold an evidentiary hearing on the Franks claim, and the Court should reject Rudolph's Franks challenge as a matter of law

Summary of Argument

Rudolph's Franks allegations fail because the search warrant affidavit accurately summarizes the information developed at that the time of the search, and the facts Rudolph alleges were intentionally omitted from the affidavit do not, if added to the affidavit, alter the existence of probable cause.

First, the statements in the affidavit are factually accurate. The search warrant affidavit states that an eyewitness, J.H., saw an individual "walking quickly away from the clinic" where a bomb exploded. The affidavit further states that J.H. followed this individual and, upon losing sight of him, saw a gray foreign-made pick-up truck "in the vicinity" where J.H. lost sight of the individual. Rudolph alleges that the agents who drafted the search warrant affidavit intentionally lied about these facts in an effort to mislead the magistrate judge. These statements, however, not only

directly quote from an FBI executive communication that existed at the time of the search, but the quoted statements accurately reflect the information provided by J.H. This is demonstrated by referring to a transcript of a videotaped interview conducted of J.H. before the search, during which J.H. told investigators that: (1) he saw an individual in proximity to the clinic (in a park across the street) walking in a direction away from the clinic; and (2) after following this individual–including several instances where J.H. lost sight of the individual and then saw the same individual again–J.H. lost sight of him for the final time when the individual cut into a wooded path near Vulcan Park, only to see the same individual again soon afterward in a gray foreign pick-up truck driving close by Vulcan Park.

Second, Rudolph argues that the agents who drafted the affidavit intentionally omitted several facts about J.H.'s eyewitness account, and further alleges that the agents did so because they knew that inclusion of these facts would negate probable cause. The omitted facts identified by Rudolph, however, actually support a finding of probable cause, because the additional facts strengthen the link between the individual and the bombing. First, although the affidavit omits the fact that approximately 30 to 40 minutes elapsed from the explosion to the time at which J.H. saw the pick-up truck, the passage of this amount of time makes sense given the winding path the individual J.H. was following took to walk up Red Mountain to the

location where the truck was parked. Second, the affidavit omits the fact that, during the time that J.H. followed this individual from the scene of the bombing, he lost sight of the individual four times. This omission tells only one-half of the story, however, because J.H. also told investigators that, each time he saw the individual, he was convinced that he was following the same person, and identified descriptive facts that supported his conclusion. Finally, although the affidavit omits the fact that J.H. provided differing physical descriptions of the individual, J.H. also emphasized to the interviewing agents his belief that the individual's changed physical characteristics were the result of deliberate steps to alter his appearance as he walked away from the bombing. In sum, these additional facts, if added to the affidavit, strengthen the existence of probable cause by sharpening and providing context to the suspicious aspects of the individual's behavior.

Third, and finally, Rudolph alleges that the agents intentionally omitted critical facts about canine Garrett's reliability in an effort to mislead the magistrate judge about the significance of the dog alerting to the presence of explosives at Rudolph's storage unit. This argument, however, has been rejected time and again by the circuit courts that have encountered it. The prevailing view in the case law is that an alert by a canine that has been trained to detect the relevant odor is sufficient to establish probable cause, and that an affidavit otherwise need not delve into the intricacies of

the dog's training and field work history. Of course, courts acknowledge that a dog can have such poor training or field accuracy that these facts must be disclosed to a reviewing judge. Nonetheless, the facts here establish that canine Garrett, which alerted at Rudolph's storage shed, had been certified as 100 percent accurate only months before the search and did not have a field history of false positives, and the published court decisions have concluded that dogs with much lower accuracy rates than Garrett are sufficiently reliable for the purposes of establishing probable cause.

In sum, Rudolph's Franks arguments fail as a matter of law. The intentional misrepresentations identified by Rudolph are, in reality, factually accurate statements. The omitted facts regarding J.H.'s eyewitness account identified by Rudolph actually strengthen the presence of probable cause. Finally, the statements in the affidavit regarding canine Garrett are sufficient do not, as a matter of law, give rise to a Franks violation. The Court therefore should reject Rudolph's Franks arguments.

Background

On the evening of Saturday, February 1, 1998, FBI Special Agent Rexford Vernon and ATF Special Agent David Booth presented an affidavit (referred to in this pleading as "the Affidavit") to United States Magistrate Judge Max O. Cogburn, Jr., of the Western District of North Carolina, in support of a search warrant for Unit 91 at Cal's Mini Storage in Marble, North Carolina.

In the Affidavit, Special Agents Vernon and Booth describe the explosion of a bomb at the New Woman, All Woman Health Care Clinic in Birmingham on January 29, 1998, and recite the following investigative facts:

- A witness saw an unidentified white male "walking quickly away from the clinic immediately following the explosion" (Aff. ¶ 5);
- The witness followed the male, who he described as approximately mid-thirties in age and having average height, medium build, and brown hair, for several blocks before losing sight of him (id.);
- The witness then saw a small gray-colored foreign pick-up truck bearing North Carolina license plate number KND1117 "in the same vicinity" as the location where the witness lost sight of the individual (id.);
- A search of North Carolina vehicle databases showed that license tag number KND1117 was issued to a 1989 Nissan pick-up truck, and that North Carolina drivers license number 8814120 had been issued to Eric Robert Rudolph at 30 Allen Avenue, Asheville, North Carolina. A search of the North Carolina State Bureau of Investigation records showed that Rudolph's 1989 Nissan pick-up truck had not been reported stolen (id. ¶¶ 6, 8);
- The drivers license data showed that Rudolph was a white male, 5' 11" in height, with blue eyes and brown hair, and 32 years old (id. ¶ 6);

- On January 30, 1998, the U.S. District Court for the Northern District of Alabama issued a warrant for Rudolph's arrest as a material witness to a grand jury investigation (id ¶¶ 5-6); and
- On February 1, 1998, a canine named Garrett was walked around Cal's Mini Storage in Marble, North Carolina, by his handler, ATF Special Agent Ray Neely. Canine Garrett received six weeks of explosive odor imprintation training and then was trained in the ATF's Canine Explosive Detection School. Canine Garrett completed his training in July 1997. Garrett's training allowed him to recognize five different families of explosives and to detect these explosives in trace amounts. Special Agent Neely is an ATF-certified canine handler who, in addition to other training an experience, successfully completed the ATF Canine Explosives Detection School with Garrett. On February 1, 1998, canine Garrett twice alerted to the door handle and right side lock of Unit 91 at Cal's Mini Storage. Interviews of Cal Stiles, the owner of Cal's Mini Storage, and a review of documentation maintained by Stiles, showed that Eric Rudolph was the renter of Unit 91 (id. ¶¶ 9-16).

At 10:57 p.m. on February 1, 1998, Judge Cogburn signed the warrant, which was assigned case number 2:98-M-08 (referred to in this pleading as "Search Warrant 2:98-M-08").

Argument

A search warrant may be invalidated if the affiant made statements that are deliberately false or that demonstrate a reckless disregard for the truth. Franks v. Delaware, 438 U.S. at 171-72; United States v. Novaton, 271 F.3d 968, 986 (11th Cir. 2001). A defendant does not establish a Franks violation, however, by showing that the affidavit submitted in support of the warrant contains an error, or even several negligent errors. Accidental mistakes, or even negligent misrepresentations, are insufficient to establish a Franks violation. United States v. Wuagneux, 683 F.2d 1343, 1355 (11th Cir. 1982) (holding that even if affiant negligently misrepresented facts in affidavit, "such allegations of negligence or innocent mistake are insufficient").

The Eleventh Circuit has not adopted a specific standard for a finding of reckless disregard in the Franks context. Kelly v. Curtis, 21 F.3d 1544, 1554 (11th Cir. 1994) ("the difference between 'reckless' and merely 'negligent' disregard for the truth is not crystal clear; we have not staked out a bright line"). Several circuit courts require a showing that an affiant must have held a serious doubt as to the accuracy of a fact in the affidavit. E.g., Wilson v. Russo, 212 F.3d 781, 788 (3d Cir. 2000) ("In applying the reckless disregard test to assertions, we have borrowed from the free speech arena and equated reckless disregard for the truth with a 'high degree

of awareness of [the statements'] probable falsity.'") (quoting Lippay v. Christos, 996 F.2d 1490, 1501 (3d Cir.1993)); United States v. Clapp, 46 F.3d 795, 801 n.6 (8th Cir. 1995) ("The test for determining whether an affiant's statements were made with reckless disregard for the truth is thus not simply whether the affiant acknowledged that what he reported was true, but whether, viewing all of the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.")

To be entitled to a hearing on the validity of a warrant on this ground, a defendant must make "a substantial showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." Franks, 438 U.S. at 155. A bare allegation is insufficient to justify a Franks hearing. Madiwale v. Savaiko, 117 F.3d 1321, 1326-27 (11th Cir. 1997); United States v. Mathison, 157 F.3d 541, 548 (8th Cir. 1998) ("A mere allegation standing alone, without an offer of proof in the form of a sworn affidavit or witness or some other reliable corroboration, is insufficient to make the difficult preliminary showing."). Similarly, an offer of proof that simply establishes an accidental mistake or negligent misrepresentation does not rise to the standard required to order an evidentiary hearing. United States v. Astroff, 578 F.2d 133, 136 (5th Cir. 1978) ("even a Franks hearing to consider allegations of negligent

misrepresentations was unnecessary").

It also is unnecessary to hold a Franks hearing if, assuming for purposes of argument that the alleged misrepresentations in the affidavit were made intentionally or with reckless disregard for the truth, the remaining information in the affidavit (excluding the misrepresentations) is sufficient on its own to establish probable cause for a search. Franks, 438 U.S. at 171 ("if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content to support a finding of probable cause, no hearing is required").

Rudolph claims that Special Agents Vernon and Booth violated Franks in a variety of ways. First, Rudolph alleges that the agents intentionally misrepresented facts provided by an eyewitness, J.H., who saw Rudolph walking away from the bombing site, and also intentionally omitted critical facts about J.H.'s eyewitness account. Second, Rudolph alleges that the agents intentionally omitted critical facts about canine Garrett's reliability.

I. Franks Allegations Relating to J.H.'s Eyewitness Account

When assessing whether Special Agents Vernon and Booth accurately summarized the investigative facts included their Affidavit, the Court examines the facts known to the agents at the time they prepared their Affidavit. With respect to J.H.'s eyewitness account, the facts available to Special Agents Vernon and Booth

are found in four documents: (a) an FBI executive communication dated January 30, 1998 (the "Executive Communication"), summarizing the investigative events known at that time and identifying the next steps to be taken in the investigation (attached as Ex. 1; BH-EC-004756-61); (b) an affidavit prepared by Assistant United States Attorney Robert J. McLean, dated January 30, 1998 ("McLean Affidavit"), submitted in support of the material witness warrant issued by Magistrate Judge Paul W. Greene that same day (attached as Ex. 2); and (c) a February 1, 1998, investigative summary by several of the agents present at the January 29, 1998, interview (the "Investigative Summary") (attached as Ex. 3, filed under seal; BH-1B-001233-37).[1] These three documents summarize information provided by an eyewitness, J.H., during a videotaped interview of J.H. that occurred just hours after the explosion on January 29, 1998. A transcript of this interview was prepared on February 2, 1998, the day after the Affidavit was signed (the "Interview Transcript") (attached as Ex. 4, filed under seal; BH-302-005610-45).

Of course, the fact that the Executive Communication, the McLean Affidavit, and the Investigative Summary existed at the time that Special Agents Vernon and

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[1] The United States expects that, if an evidentiary hearing were held, Special Agents Vernon and Booth would testify that, when drafting their Affidavit, they relied upon the January 30, 1998, Executive Communication, the McLean Affidavit, and oral conversations with agents in Birmingham, and that the agents did not review the February 1, 1998, Investigative Summary.

Booth prepared their Affidavit does not necessarily mean that the agents actually relied on all three of the documents when drafting the Affidavit. As argued later in this pleading, it is possible that Special Agents Vernon and Booth did not see these any one or more of these documents when preparing their Affidavit. Nonetheless, because statements in the agents' Affidavit accurately reflects the information in all three documents, it is appropriate for purposes of this argument to assume that these documents were available to the agents as they drafted their Affidavit. Moreover, because the three documents rely upon statements during an interview that are summarized in the Interview Transcript, it also is appropriate to examine the Interview Transcript to ensure that the facts contained in the Executive Communication, McLean Affidavit, and Investigative Summary are accurate.

1. The Agents Did Not Misrepresent Facts Provided by Eyewitness J.H.

In the Affidavit, Special Agents Vernon and Booth summarize several statements by J.H. regarding his observations immediately after the explosion. Specifically, the Affidavit states that: (1) "A witness [J.H.] observed an unidentified white male walking quickly away from the clinic immediately following the explosion"; and (2) "The witness [J.H.] followed this male, approximately mid-thirties in age, average height, medium build, with brown hair, for several blocks

before losing sight of him. Later, in the same vicinity, the witness observed a small gray colored foreign made pickup truck bearing North Carolina tag KND1117." Rudolph alleges that both these statements constitute intentional misrepresentations designed to mislead Magistrate Judge Cogburn into issuing the search warrant.

A. J.H. Saw an Individual "Walking Quickly Away From the Clinic"

Special Agents Vernon and Booth's statement that J.H. saw an individual "walking quickly away from the clinic" is a factually accurate description of the eyewitness account that J.H. provided to investigators. Stated simply, J.H. reported to investigators that, after the explosion, he noticed an individual approximately 200 feet from the clinic who was walking in a direction away from the clinic. Accordingly, the agents' statement in the Affidavit that J.H. saw an individual walking quickly "away from the clinic" accurately captures the information provided by J.H.

Indeed, the language used in Special Agents Vernon and Booth's Affidavit directly quotes the language found in the Executive Communication: "Preliminary investigation has determined that several individuals witnessed the explosion and the events immediately surrounding it. One witness in particular described an individual walking quickly away from the clinic immediately following the explosion." (Ex. 1; BH-Ec-004757) (emphasis added). The Affidavit also accurately reflects the

information set forth in the McLean Affidavit: "On January 29, 1998, a bomb was detonated outside a reproductive health services clinic located at 1001 17th Street South, Birmingham, Alabama. A witness reported to agents of the Federal Bureau of Investigation that the individual he had earlier observed leaving the scene of the bombing, he later observed driving a grey Nissan pickup truck with North Carolina license plate number KND1117." (Ex. 2, ¶ 3). Finally, the Investigative Summary states that, after the J.H. heard the explosion, he "noticed a white male, walking at a southwesterly angle across the park towards 11th Avenue at a quick pace." (Ex. 3; BH-1B-001233.)

The affiants' statement that J.H. saw an individual "walking quickly away from the clinic" thus accurately captures and summarizes, and even quotes directly from, the information contained in these three documents. Rudolph's Franks claim therefore fails unless he can show that the three documents intentionally or recklessly misrepresent the information provided by J.H.[2] To that end, the Court has at its

[2] Importantly, the Executive Communication, the McLean Affidavit, and the Investigative Summary were not prepared for the purpose of providing information to another officer to include in a search or arrest warrant affidavit; rather, the documents were prepared for the purpose of memorializing the facts identified at that stage of the investigation. This fact counsels against a finding that the authors of these documents intentionally misstated facts in order to support a search warrant that may not have been contemplated when the documents were being prepared.

disposal direct quotations from J.H's Interview Transcript, which shows that J.H. told investigators:

> Okay, what I witnessed, was, uh, suddenly there was this loud boom, I mean, it was loud and distinctive, I was inside my dorm room washing my clothes and I heard the boom, so, you know, I went, what was that and I looked out the window. . . . And I looked out the window and I looked and I guess the first thing I seen was the smoke coming from the thing and then I just like, I looked at everything, sorta, I don't know why, and I seen this guy walking across the park with long hair and so, I, I came out of the building, I said, I saw this girl and I said, "Did you hear that," and she said, "Yeah, what was that," and I said, "I don't know," so I went outside and still seen the smoke and then, for some reason, I seen this guy just walking across the park and he didn't, and when I seen him, he didn't, like he never turned around, cause I seen him a little bit farther across the park than when I seen him the first time and then, to me, I thought it looked kinda weird because this guy, he never, I mean it's like he's just walking, he didn't turn around to see what happened, cause this boom, I know if it was that loud on the inside, how loud it must have been on the outside. .... Upon looking out, and I seen him, you know, keep on, keep on walking and so, I don't know what made me do this but I was just like, this guy looked strange, that was, that was my first thought, it was like, wait a minute. Why didn't this guy turn around and he, he even looked to see what happened, you understand, so, then I just kept watching him and then, getting ready to go across the street, he kinda, he kinda started to run....

(Ex. 4; BH-302-005610-11.)

J.H. further described his observation of the individual:

J.H.: No, there wasn't anything odd, I guess, the thing that really made me, it was just like he was intense, like he wasn't looking back, he wasn't like, you know, it was that sorta like just intense like, then he started kinda ran across the street then he, and it was, uh, uh, a faster paced walking, it wasn't like ... cause I was thinking,

I was like the buses stop over here, the buses be running this area and, I mean, I just kept thinking about things, ah, why would you be going in that direction, I said maybe he got out of class, just got out of class, cause, and I was just all these things running through my head, I was saying, this ain't right, this ain't right, cause he would at least stopped and looked, he would have stopped, cause I know if I was out there and boom, I'm like oh what's going on, I'd walked over in there and seen exactly what happened, I mean, it didn't sound like a gun shot, it sounded like a kabloom, I mean, it sounded like more distinctive than a gun shot to me.....

...

OFFICER: But you saw him cutting across, ah, the park, which is between 16, your dorm is on 16th Street, the next street up is 17th, you saw him cut between the park, between 16th and 17th correct?

J.H.: Let me see...

OFFICER: Remember, your dorm is right here.

J.H.: Yeah.

OFFICER: And there's that little park right there.

J.H.: There's a little park, and he was like cutting like, it was like this sorta.

OFFICER: Okay, going up towards 15th Avenue.

J.H.: And the first time he was back further this way and the second time I seen him he was up here and I was like...

OFFICER: Okay, so you followed him.

J.H.: Yes sir.

(Ex. 4; BH-302-005613-14.)

J.H. revisited this topic one final time later during the interview:

[J.H.] ... Like that morning I had decided, like I got up and started studying for a test at 5:30 and I was studying for this test and I was like I need to wash my clothes, so I ran downstairs, threw my clothes in the laundry, then I went back upstairs and then, like the second time, I went to put them in the dryer and then, put em in the dryer and then came to take them back down, this is, I came to take them back down, I was take them out, I was like came out to take them out and then something like, sitting there, I look out the window, you know, I saying are they dry and all of a sudden BOOM, soon as that happened it was like one step I'm at the window. I'm looking out the window, dang what was that, and I see this like, I think it's a smoke or fog or something but I said maybe that morning, that's when I seen this guy walking across the park.

OFFICER: Okay, okay, you saw the smoke, right?

J.H.: Yeah.

...

OFFICER: Okay, but, uh, you were in your dorm room.

J.H.: No, not my dorm room, I was ...

OFFICER: You were down in the laundry room.

J.H.: Laundry room.

OFFICER: Okay. Uh, the guy, I mean when you saw the man he was walking on??

J.H.: Yes sir. **He was walking away**.

OFFICER: How close was he to the smoke and the mist?

J.H.: He was some distance away, he was like, huh, **he was coming from that general direction, he was coming from, well the general direction he was coming from was like the park and then, basically he was walking across the park, but he was walking away from that generalized general location, like, like that.**

(Ex. 4; BH-302-005631-33) (emphasis added).

The Interview Transcript thus establishes that J.H., upon looking out the window after the bomb detonated, saw an individual in Rast Park, located right across the street and approximately 200 feet from the clinic, walking in a direction away from the clinic. This is confirmed by referring to a map of the area, attached to this pleading as Exhibit 5, that shows the locations of the clinic and the park where J.H. first saw the individual walking away from the clinic (indicated with the letter A on the map).

Rudolph nonetheless persists that Special Agents Vernon and Booth's statement that J.H. saw an individual "walking quickly away from the clinic" is "patently false" and was intended to mislead Magistrate Judge Cogburn into believing that J.H. saw the individual on the clinic property. This argument fails for two reasons. First, the agents' statement is accurate in that it reflects that the individual observed by J.H. was located nearby the clinic and was walking in a direction

opposite from the clinic. In the words of J.H. himself, the individual was "some distance away" from the explosion, but "was coming from that general direction" and "was walking away from that generalized general location." (Ex. 4; BH-302-005632-33.) The attached map of the area shows that the location of the individual was sufficiently close to the bomb site to allow a reasonable inference that this individual was in close proximity to the bombing when he was spotted by J.H. (Ex. 5, indicated as letter "A.")

Second, Rudolph's argument is premised upon an exercise in hypertechnical wordsmithing of the phrase "walking quickly away from the clinic," and constitutes grammatical hairsplitting that is inconsistent with the "realistic and commonsense approach" that courts employ when reading language in an affidavit. United States v. Miller, 24 F.3d 1357, 1361 (11th Cir. 1994). It perhaps may have been more precise to state that J.H. saw the individual walking away from the area of the bombing, but the fact remains that J.H. saw the individual walking nearby the clinic in a direction away from the clinic. The statement in the Affidavit is therefore accurate.[3]

B. J.H. Observed a Grey, Foreign-Made Pick-Up Truck "In the Same

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[3] In his Motion, Rudolph alleges that J.H. "was blocks away from the scene of the crime when he heard an explosion." Rudolph's allegation is readily controverted by a cursory glance at a map showing the locations of Rast Hall and the New Woman, All Woman Health Care Clinic. See Exhibit 5 (showing the location of the clinic and Rast Hall at letter "A").

Vicinity" as the Location Where J.H. Lost Sight of the Individual He Followed From the Explosion

Rudolph's second Franks argument is that Special Agents Vernon and Booth lied to the magistrate by stating that J.H. observed a small gray-colored foreign-made pick-up truck bearing North Carolina tag KND1117 "in the same vicinity" as the area where J.H. lost sight of the individual he followed from the bombing. The agents' statement, however, is factually accurate, as J.H. told investigators that he saw a gray foreign pick-up truck with a camper top down the street from the place he last saw the individual he followed from the bombing site. The statement therefore does not come close to the type of intentional misrepresentation necessary to establish a Franks violation.

Here again, Special Agents Vernon and Booth's Affidavit quotes directly from the language found in the Executive Communication: "This witness thereafter follows this person for several blocks before the person was lost from sight. The person, whom was described as a white male adult approximately mid thirties in age, average height, medium build, with light colored hair, was subsequently spotted a few minutes later in the same vicinity in a gray small foreign make pickup truck." (Ex. 1; BH-EC-004757) (emphasis added). The Investigative Summary provides a more detailed description of the route described by J.H. after the bombing, but ultimately states that

J.H. "saw the subject enter a trail into the wooded area across from the MCDONALD's. J.H. then drove his vehicle around the area for several minutes when he observed a white male wearing similar clothing driving a small gray pickup truck driving eastbound on Valley Avenue.... He stated he last saw the truck near the intersection of Valley Avenue and Highway 31." (Ex. 3; BH-1B-0001234-35.) Notably, traveling eastbound on Valley Avenue eastbound to the intersection of Valley Avenue and Highway 31 passes less than a block or approximately 100 feet from the McDonald's restaurant.[4]

Accordingly, Special Agents Vernon and Booth's statement that J.H. saw the truck "in the vicinity" of where he last saw the individual accurately captures and summarizes, and even quotes directly from, the information contained in the Executive Communication and the Investigative Summary. A Franks claim therefore fails unless Rudolph can show that these two documents intentionally or recklessly misrepresent the information provided by J.H. Again, any such showing is refuted by direct reference to J.H.'s statements during the videotaped interview. The Interview Transcript shows that J.H. described the following events that occurred during his observation of this individual after the explosion:

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[4] The McLean Affidavit does not mention the location where J.H. saw the pick-up truck.

1. After seeing the individual walking across Rast Park, J.H. got into his car and drove down 16th Street South, where J.H. saw the individual walking south. J.H. followed the individual for several blocks to an alley between 14th and 15th Streets, where the individual turned east and walked into the alley. J.H. did not follow the individual into the alley and lost sight of him (Ex. 4; BH-302-005614-16) (these events are indicated on Exhibit 5 with the letter "B");

2. J.H. drove south on 16th Street South and turned at the next street, heading east on 15th Avenue South, where he parked in front of an apartment complex. J.H. then saw the same individual, now wearing different clothing and displaying a different hair style, walk onto the north sidewalk of 15th Avenue South and head east. J.H. followed the individual for approximately one block, and then attempted to stop other motorists to ask them to call police. J.H. lost sight of the individual when he spoke with another motorist (Ex. 4; BH-302-005618-24) (these events are indicated on Exhibit 5 with the letter "C");

3. After speaking with the motorist, J.H. drove around looking for the individual, and then stopped at a McDonald's at 2001 20th Street South, located approximately at the corner of 20th Street South and 20th Avenue South, to use the telephone to call police. During his telephone conversation, J.H. saw the same individual walking south on 20th Street South in the direction of Valley

Avenue. J.H. watched the male turn and walk on a path into the woods along the side of 20th Street South, heading west. J.H. lost sight of the individual after the individual walked into the woods (Ex. 4; BH-302-005624-26) (these events are indicated on Exhibit 5 with letter "D");

4. J.H. left the McDonald's in his car and drove west on Valley Avenue. As J.H. neared the intersection of Beckham Drive, he saw a gray Nissan pick-up truck with a camper shell traveling in the opposite direction on Valley Avenue. J.H. saw that the same individual he had been following earlier was driving the Nissan-pick-up truck (Ex. 4; BH-302-005627-31) (these events are indicated on Exhibit 5 with the letter "E"); and

5. J.H. made a U-turn on Valley Drive and followed the pick-up east on Valley Avenue toward the intersection with 20th Street South. J.H. saw the license plate number, North Carolina KND1117, as he followed the pick-up. J.H. lost sight of the pick-up at the corner of Valley Avenue and 20th Street South. (Ex. 4; BH-302-005627-31) (these events are indicated on Exhibit 5 with the letter "F").

In sum, J.H. last saw the individual he was following at the corner of 20th Street South and 20th Avenue South, which is less than 50 feet from Valley Avenue. See Ex. 5 (map) at letter D. J.H. then reported that he saw the gray foreign pick-up truck on

Valley Avenue near the intersection with Beckham Drive, which is approximately 1,000 feet from the intersection of 20th Street South and Valley Avenue. See Ex. 5 (map) at letter E. Finally, J.H. followed the gray pick-up truck to the intersection of Valley Avenue and 20th Street South, which is located less than 50 feet from the location where J.H. saw the individual duck into the woods. See Ex. 5 (map) at letter F. The agents's statement that J.H. saw the pick-up truck "in the same vicinity" of this location therefore is entirely accurate, as J.H. saw the pick-up truck a short distance down the street from the intersection where J.H. last saw the individual turn into the wooded area. Consequently, Rudolph fails to establish that Special Agents Vernon and Booth misled Magistrate Judge Cogburn or misrepresented facts provided by J.H.[5]

2. Special Agents Vernon and Booth Did Not Omit Critically Important Facts Relating to J.H.'s Eyewitness Account From the Affidavit

In addition to arguing that Special Agents Vernon and Booth sought to mislead

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[5] Rudolph may be suggesting that the Court must read the agents' Affidavit to mean that J.H. saw the truck "in the vicinity of" the clinic rather than the location where J.H. lost sight of the individual he was following. The United States submits that such an interpretation is grammatically incorrect, as the phrase "in the same vicinity" follows the location where J.H. lost sight of the individual he was following. To the extent Rudolph's argument is based on this interpretation, the argument evidences the hypertechnical grammatical exercise that is rejected when reviewing search warrant affidavits.

Magistrate Judge Cogburn with affirmative misrepresentations, Rudolph alleges that the agents intended to deceive Magistrate Judge Cogburn by deliberately omitting critically important facts about J.H.'s eyewitness account that, if included, would have prevented a finding of probable cause. Rudolph's argument fails for several reasons. First, Rudolph fails to show that Special Agents Vernon and Booth were even aware of the facts identified by Rudolph, such that they could intentionally omit the facts. Second, and more importantly, inclusion of the facts identified by Rudolph does not alter the existence of probable cause to justify the search, thus precluding a Franks violation as a matter of law.

The Franks doctrine applies to omissions, so long as the omission was made intentionally or with a reckless disregard for the accuracy of the affidavit. Madiwale, 117 F.3d at 1327. "Omissions that are not reckless, but are instead negligent, ... or insignificant and immaterial, will not invalidate a warrant." Id. Reckless disregard may be inferred if the affiant omits facts that are "clearly critical" to a finding of probable cause. Id. However, a finding that the affiant intentionally or recklessly omitted a critical fact does not compel the invalidation of the warrant if the omitted fact, when added to the facts set forth in the affidavit, still permits a finding of probable cause. Id.

The leading guidance for assessing alleged Franks omissions is found in the

Fourth Circuit's opinion in United States v. Colkley, 899 F.2d 297 (4th Cir. 1990). Colkley emphasizes that a defendant is not entitled to a hearing simply because he has shown that an agent intentionally omitted facts from an affidavit. Id. ("[E]very decision not to include certain information in the affidavit is 'intentional' insofar as it is made knowingly. If ... this type of 'intentional' omission is all that Franks requires, the Franks intent prerequisite would be satisfied in almost every case."). Rather, the defendant must establish that the affiant's omission was deliberately designed to mislead, or was made with reckless disregard that the omission could mislead, the magistrate judge. Id.

> While omissions may not be per se immune from inquiry ... the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter[s] that might, if included, have redounded to defendant's benefit. The potential for endless rounds of Franks hearings to contest facially sufficient warrants is readily apparent.

Colkley, 899 F.2d at 301.[6]

Rudolph identifies three facts relating to J.H.'s eyewitness account that were omitted from the Affidavit to support his Franks argument: (1) approximately 40

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[6] Consequently, "some care is required in applying the Franks intentional-or-recklessness requirement to omissions." 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.4(b) (3d ed. 1996).

minutes elapsed between the moment of the explosion and the moment J.H. saw the gray pick-up truck; (2) when following the individual from the scene of the explosion, J.H. lost sight of the individual four times before finally losing sight of him near the McDonald's restaurant; and (3) J.H. provided differing physical descriptions of the individual he followed.

First, it is worth pointing out that two of the documents in existence at the time that Special Agents Vernon and Booth drafted their Affidavit do not contain the three omitted facts identified by Rudolph. The Executive Communication states that: (1) J.H. saw the gray pick-up truck "a few minutes" after losing sight of the individual he had followed, but does not identify the time that elapsed after the explosion; (2) J.H. followed the individual "for several blocks before the person was lost from sight"; and (3) the individual "was described as a white male adult approximately mid thirties in age, average height, medium build, with light colored hair." (Ex. 1; BH-EC-004757). The McLean Affidavit states that: (1) J.H. reported to agents that "an individual he had earlier observed leaving the scene of the bombing, he later observed driving a gray Nissan pickup truck with North Carolina license plate number KND1117," and otherwise omits any of the events that occurred during J.H.'s efforts to follow the individual as well as a physical description of the individual. (Ex. 2, ¶ 3).

Rudolph's Franks argument assumes that Special Agents Vernon and Booth were aware of the facts he identifies in his Motion to Suppress, but the record does not substantiate this assumption. Given the fact that several of the documents in existence at the time the Affidavit was drafted omit these facts, it is indeed possible that the agents may not have been aware of these facts. Given this record, Rudolph has failed to make substantial showing that the agents intentionally or recklessly omitted these facts from their Affidavit.

More importantly, the record shows that if the omitted facts identified by Rudolph are added to the agents' Affidavit, probable cause still exists to justify the search. The Interview Transcript reveals the following relevant facts:

1. When J.H. first saw the individual in Rast Park across the street from the clinic, he described the individual as follows: a white male in the 6' 1" height range, weighing between 175 and 185 pounds with brownish long hair; wearing a black baseball cap, dark pants, and a coat, and carrying a black back pack that appeared to be empty (J.H. further advised that, in his later sightings of this individual, the book bag appeared to be full). J.H. lost sight of the individual momentarily when he got into his car, but upon turning southbound onto 16th Street South moments later, he saw the same individual walking southbound down 16th Street South. J.H. followed the individual for several blocks until

the individual ducked into an alley between 14th and 15th Avenues South. Just before the individual ducked into the alley, J.H. saw the individual pull something out of his pocket with his right hand, and then J.H. lost sight of the individual (Ex. 4; BH-302-005611-18) (these events are indicated on Exhibit 5 with the letter "B");

2. J.H. drove south on 16th Street South and turned at the next street, heading east on 15th Avenue South, where he parked in front of an apartment complex. J.H. then saw the same individual walk out from the apartment complex. The individual was carrying the same black back pack J.H. had seen before, and now held a blue plastic shopping bag that appeared to be full but not heavy. J.H. said that the individual had a different hair style, as it was rather average length and "either brown or blackish" in color, and he was no longer wearing the coat and baseball cap J.H. saw before. J.H. noticed the individual was wearing a light colored shirt. Despite these differences, J.H. was "pretty sure this was the same guy."[7] In fact, he told the interviewing officers that he believed that the individual had changed clothes and taken off a wig. For

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[7] At one point, an officer asked J.H., "You don't think it could have been somebody just walking out [of the apartment complex] with a similar back pack?" J.H. responded, "No sir." The officer asked, "Okay, in your mind it's the same guy." J.H. responded, "Yes sir." (Ex. 4; BH-302-005636-37.)

instance, J.H. observed that the individual's hair was matted down and "gave me the impression that he took off a wig." J.H. saw the individual walk onto the north sidewalk of 15th Avenue South and head east. J.H. stopped his car in front of the individual and pretended that his engine was malfunctioning, allowing him to get out of his car and look at this individual from across the street as the individual walked by J.H.'s car. J.H. was not sure whether the individual had facial hair, but he observed that the individual wore dark sunglasses. J.H. reentered his car after the individual walked past and followed the individual for approximately one block, and then attempted to stop other motorists to ask them to call police. J.H. lost sight of the individual when he asked a female motorist to call the police (Ex. 4; BH-302-005618-23, 34-35, 39) (these events are indicated on Exhibit 5 with the letter "C");

3. After speaking with the female motorist, J.H. drove around looking for the individual for what J.H. believed to be approximately 15 to 30 minutes,[8] and then stopped at a McDonald's at 2001 20th Street South to use the telephone to call police. During his telephone conversation, J.H. saw the same individual walking south on 20th Street South in the direction of Valley Avenue. During

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[8] The 911 dispatch log shows that J.H. called police from the McDonald's at 7:54 a.m., so J.H. appears to have driven around looking for this individual for approximately 15 to 20 minutes. (Ex. 6; BH-302-000085.)

his interview, J.H. told investigators that he was "pretty sure this [was] the same guy" because the individual's hair and back pack were similar to those J.H. had seen earlier, and the individual was the same height and weight as J.H. had seen earlier. J.H. noticed that the individual was no longer carrying the blue bag, but the black back pack that earlier appeared to be empty now appeared to be "filled up with stuff." J.H. could not recall whether the individual was wearing sunglasses at that time. J.H. told investigators that another McDonald's customer overheard his conversation with the dispatch officer and called out to J.H. the clothing worn by the individual, but J.H. was unable to recall what the customer said. J.H. himself recalled that the individual wore a blue or blackish long-sleeve shirt underneath another shirt that was lighter in color. J.H. watched the male turn and walk on a path into the woods alongside of 20th Street South, heading west. J.H. lost sight of the individual after the individual walked into the woods (BH-302-005624-26, 39) (these events are indicated on Exhibit 5 with letter "D"); and

4. J.H. spoke with a police officer at the McDonald's for five to seven minutes, and then left the McDonald's in his car. J.H. drove west on Valley Avenue. As J.H. neared the intersection of Beckham Drive, he saw a gray pick-up truck with a camper shell traveling in the opposite direction on Valley Avenue. J.H.

saw that the same individual he had been following earlier was driving the pick-up truck. J.H. noticed that the individual in the truck had the same hair and wore the same shirt combination as the individual he had been following, but he added that the individual now appeared to have a mustache. Nonetheless, J.H. told the investigators that he believed that the same individual he had been following was driving the truck. J.H. believed that the individual was between 34 and 42 years old. (Ex. 4; BH-302-005626-31, 42-44) (these events are indicated on Exhibit 5 with the letter "E"); and

5. J.H. made a U-turn on Valley Drive and followed the pick-up east on Valley Avenue toward the intersection with 20th Street South. J.H. wrote down the license plate number, North Carolina KND1117, as he followed the pick-up. J.H. lost sight of the pick-up at the corner of Valley Avenue and 20th Street South (BH-302-005591-95; 005606 (these events are indicated on Exhibit 5 with the letter "F").

These facts show, as Rudolph alleges, that approximately 30 to 40 minutes elapsed from the moment of the explosion to the moment that J.H. saw the individual driving the gray foreign-made pick-up truck. The passage of this amount of time makes sense, however, as J.H. followed the individual, who was on foot, on a circuitous route away from the scene of the bombing, up Red Mountain, and to the

area of the Vulcan statue. Another eyewitness saw the individual get into the pickup truck where it was parked on Beckham Drive some 1,000 feet down Valley Avenue from Vulcan Park, and then both J.H. and the other eyewitness saw the individual driving the truck westbound down Valley Avenue. In every instance that J.H. saw this individual–whether the individual was walking or driving the truck–J.H. affirmed to the interviewing officers his conviction that it was the same person. Understandably, it would take some time to walk up Red Mountain to Vulcan Park, especially given the fact that the individual appears to have selected an indirect route to the location where the pickup truck was parked. Under these circumstances, the passage of 40 minutes is not only reasonable, but corroborates and supports the eyewitness accounts of J.H. and the other witness.

Next, the facts show, as Rudolph alleges, that J.H. lost sight of the individual he followed from the scene of the bombing on four separate occasions, and that the physical description of the individual changed during the course of J.H's observations. The dramatic significance attributed to these facts by Rudolph evaporates, however, when considered in light of J.H.'s insistence that the individual he saw on each occasion was the same person, and that J.H. offered to the officers his belief that the individual he was following was deliberately changing his appearance as he walked away from the scene.

For example, after J.H. lost sight of the individual on 16th Street South, he saw the individual emerge from the apartment complex on 15th Avenue South and noticed that the person had a different hair style. J.H. said that, unlike the first time he saw the individual, the individual's hair was "either brown or blackish" in color and seemed shorter than the length J.H. saw before, and that the individual no longer wore a coat and black baseball cap. However, J.H. further stated that he was "pretty sure this was the same guy," and he observed that the individual still carried the same black back pack he saw before. Moreover, J.H. offered his opinion that, based on the appearance of the individual's hair, he believed that the individual had taken off a wig and changed some of his clothes, which is consistent with J.H.'s observation that the individual now carried a blue plastic shopping bag that appeared to be full but not heavy. When pressed, J.H. did not equivocate in his belief that the individual he saw was the same person he observed walking away from the scene:

Officer: You don't think it could have been somebody just walking out [of the apartment complex] with a similar back pack?

J.H. No sir.

Officer: Okay, in your mind it's the same guy.

J.H. Yes sir.

(Ex. 4; BH-302-005636-37.)

J.H. then lost sight of the individual for 15 to 20 minutes, and then saw the individual again walking across the street from the McDonald's restaurant where he stopped to call police. J.H. again emphasized to the officers that he was "pretty sure this [was] the same guy," as the individual was the same height and weight as the person J.H. had seen on 15th Avenue South, and J.H. identified the same hair style and back pack he saw before as well.[9]

In sum, Rudolph's argument fails for one simple reason: the omitted facts identified in Rudolph's motion do not undermine J.H.'s insistence to the interviewing officers that the person he saw in Rast Park walking away from the scene of the explosion, again on 16th Street South, again on 15th Avenue South, again on 20th Street South, and again in the gray pick-up truck on Valley Avenue is the same person. J.H. expressly stated that the individual he followed was acting suspiciously to him, and J.H.'s observations allowed him to advise the officers that the individual appeared to

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[9] In any event, it is not unusual for a witness to recall different things about a suspect's clothing at different stages of a single interview, especially if the interview occurs soon after an event. This is demonstrated by the following statement in J.H.'s own interview regarding the two overlapping shirts worn by the individual that J.H. had followed from the explosion: "Oh, oh, oh, my God, oh my God, I just thought of something. I mean it's not important but the blue, this is the say I seen it, the blue shirt like here and then the other shirt was like right here and it was like, it was either folded up or something and it was like, it may have been longer or shorter but this shirt was like the shirt, the blue shirt I seen under it was like right here." (Ex. 4; BH-302-005642.)

be intentionally changing his physical appearance as he walked farther away from the explosion. In short, the additional facts show that J.H. saw someone who resembles Rudolph's physical description walking away from the scene of the bombing in a suspicious manner, and later driving in a truck that is registered to Rudolph.

If these facts are added to Special Agents Vernon and Booth's Affidavit, the additional facts strengthen the connection between Rudolph, his truck, and the bombing of the clinic, and thus support the existence of probable cause. Under these circumstances, the omitted facts cannot, as a matter of law, form the basis of a Franks violation. Madiwale, 117 F.3d at 1327.

II. Omissions Relating to the Canine Trained to Detect Explosives

Rudolph next alleges that Special Agents Vernon and Booth deliberately misled Magistrate Judge Cogburn by omitting information regarding the training and history of Garrett, the canine trained to detect explosives. This argument, however, runs headlong into the prevailing case law of the circuit courts regarding Franks challenges based on trained canines.

Courts generally reject Franks challenges to omissions relating to the training of canines, and instead hold that an affiant need not provide a complete history of a drug dog's reliability beyond the statement that the dog has been trained and certified to detect a particular odor. United States v. Kennedy, 131 F.3d 1371, 1375 (10th Cir.

1997) ("We decline to encumber the affidavit process by requiring affiants to include a complete history of a drug dog's reliability beyond the statement that the dog has been trained and certified to detect drugs."); United States v. Sundby, 186 F.3d 873, 876 (8th Cir. 1996) ("To establish the dog's reliability, the affidavit need only state the dog has been trained and certified to detect drugs. [cits.] An affidavit need not give a detailed account of the dog's track record or education."); United States v. Gosha, 78 F. Supp. 2d 833, 844 (S.D. Ind. 1999) ("Appellate courts have generally rejected arguments that detailed information about the dog's training, certification, or accuracy record must be included in the affidavits or information presented to the judge.") (collecting cases); United States v. Williams, No. CR-3-97-0961, 2000 WL 979997, at *4 (S.D. Ohio June 5, 2000) ("Contrary to the defendant's suggestion, to establish probable cause, the affidavit need not describe the particulars of the dog's training. Instead, the affidavit's accounting of the dog sniff indicating the presence of controlled substances and its reference to the dog's training in narcotics investigations was sufficient to establish the dog's training and reliability.") (quoting United States v. Berry, 90 F.3d 148, 153-54 (6th Cir. 1996) (unpublished) (attached as Ex. 6).

Here, Special Agents Vernon and Booth's Affidavit satisfies, and even exceeds, the criteria set forth in the case law. The Affidavit states that: (1) Special Agent

Neely was a trained canine handler who had received explosives training throughout his law enforcement career; (2) Special Agent Neely completed the ATF Canine Explosives Detection School in 1997, with his canine, Garrett, a yellow Labrador retriever, and has retained control of canine Garrett exclusively since July 1997; (3) Garrett received six weeks of explosive odor imprintation training, which gave Garrett the capability to recognize five different families of explosives; (4) the odor imprintation training taught Garrett to alert to the presence of any explosive odor by sitting, and he is fed only when he alerts to the presence of an explosive odor–averaging between 80 to 100 repetitions each day of Garrett's life since his training; (5) after odor imprintation training, Garrett then participated in the ATF Canine Explosives Detection School with Special Agent Neely; and (6) because of his training, Garrett has the capability of detecting and alerting to trace amounts of explosives. Aff. ¶¶ 12-14. These facts certainly establish that Garrett is trained and certified to detect the odor of explosives, which is all that is required.

Of course, it is possible that circumstances may exist where a canine possesses such an extraordinary history of false positives or poor training that this information is relevant to a finding of probable cause. This is not the case here. The evidence in this case shows only that canine Garrett showed false positives during his training process. However, Special Agent Neely is trained to recognize false positives. More

importantly, canine Garrett completed the training process only months before the search, and "certification requires 100% success rate during the certification test." Aff. of Special Agents Vernon and Booth Dated February 3, 1998, Submitted in Support of Search Warrant 2:98-M-09, at ¶ 29.)

Given Garrett's 100 percent success rate in alerting to the presence of explosives when earning his certification, the fact that Garrett showed false positives during his training does not damage the dog's reliability to the point where the omission of this facts from a search warrant affidavit constitutes a Franks violation.[10] On this issue, the Tenth Circuit's reasoning in Kennedy is instructive. In Kennedy, drug detection dog Bobo alerted to the defendant's luggage. The record showed that, before the alert, Bobo's handler failed to field train Bobo as frequently as required by the school that had trained Bobo, and the handler also failed to maintain Bobo's field records. 131 F.3d at 1375. The field records that were available at the suppression hearing showed that, of 56 field alerts, Bobo successfully alerted 40 times and falsely alerted the remaining 16 times, for a 71.4 percent success rate.

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[10] It is implicit that, when a dog is trained to learn how to detect explosives or drugs, the dog will, in the beginning, falsely alert to try to earn food. The reason training is successful is because the dog learns that it earns food only when it successfully alerts. If Rudolph's argument is carried to its logical conclusion, each and every dog used in law enforcement today is a "multiple time liar" because, as part of the training process, the dog alerted when no explosives were present.

The defendant argued that canine Bobo's poor accuracy record should have been disclosed to the magistrate judge, and that the failure to include this fact in a search warrant affidavit constituted an omission that violated Franks. The Tenth Circuit disagreed, concluding that:

> the further investigation actually undertaken by the district court produced evidence that Bobo in fact consistently performed well enough to support a probable cause finding. None of the additional information [regarding Bobo's training and accuracy rate] would have suggested that Bobo was unreliable. In fact, the additional information suggested the opposite. The evidence indicated that Bobo correctly alerted 71% of the time in those instances where records were kept and that on those occasions where Bobo worked with Small, the dog had at least an 80% accuracy rate. **We find that a 70-80% success rate meets the liberal standard for probable cause established in [Illinois v. Gates]**.

Id. at 1377 (emphasis added); see also United States v. Diaz, 25 F.3d 392, 394 (6th Cir. 1994) ("In any event, a very low percentage of false positives is not necessarily fatal to a finding that a drug detection dog is properly trained and certified" for purposes of probable cause); Gosha, 78 F. Supp. 2d at 844 ("in the absence of evidence that the police foisted off an untrained or unreliable dog on the judge, this court finds that the search of [defendant's] luggage was supported by probable cause"); Williams, No. CR-3-97-0961, 2000 WL 979997, at *7 ("the evidence is that Pete had a success rate of approximately 95 percent, alerting successfully 180 times and unsuccessfully 7-10 times. Therefore, this Court concludes that information

about the 7-10 instances in which Pete alerted and controlled substances were not found would not have altered Judge Merz' probable cause determination, nor would information about [the] failure to maintain records concerning [dog's] unsuccessful alerts have impacted upon that determination").

Finally, the fact that the alert described in the affidavit is Garrett's first field experience does not affect the presence of probable cause, because the fact remains that Garrett, as a trained and certified to alert to presence of explosives, alerted. United States v. Cortez, No. 95-CR-275, 1995 WL 422029, at *3 (S.D.N.Y. July 18, 1995) ("Although [canine's] prior record of verified and false alerts would have provided a more accurate basis for making the probable cause determination, ... this criticism of the Search Warrant Application is insufficient to overcome the 'great deference' to be accorded probable cause determinations by magistrates and judges who issue search warrants.") (citing United States v. Dillon, 810 F. Supp. 57, 61 (W.D.N.Y. 1992) ("formal recitation of a police dog's curriculum vitae unnecessary in the context of ordinary warrant applications")) (unpublished) (attached as Ex. 7). Notably, all of the dogs considered in these cases have, on occasion, falsely alerted (and done so at rates far greater than Garrett), yet not a single judge siezed on this fact to brand the dogs "multiple-time liars."

In sum, Garrett's training and certification, as described in Special Agents

Vernon and Booth's Affidavit, sufficiently describes the reliability of the detection dog to establish probable cause. Given Garrett's certification with a 100 percent accuracy rate only months before the search in this case, the addition of the fact that Garrett showed false positives and was present for his first field experience during his training program does not alter the existence of probable cause in the Affidavit.

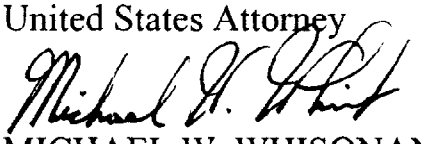
For these reasons, the Court should conclude that Special Agents Vernon and Booth adequately described canine Garrett's reliability in the Affidavit for probable cause purposes, and reject Rudolph's Franks claim as a matter of law.

Conclusion

For the reasons set forth above, the Court should conclude that Rudolph has failed to make the showing required to hold a Franks hearing, and should reject Rudolph's Franks challenge to Search Warrant 2:98-M-08 as a matter of law.

Respectfully submitted this the 29th day of October, 2004.

ALICE H. MARTIN
United States Attorney



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Special Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this 29th day of October, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record,

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MICHAEL W. WHISONANT
Assistant United States Attorney

(12/31/1995)

FEDERAL BUREAU OF INVESTIGATION

Precedence: IMMEDIATE

Date: 01/30/1998

To: FBIHQ

Attn: SIOC,
SSA Owen Harris

Atlanta

Attn: Atlanta Bomb
Task Force

Charlotte
Columbia
Louisville
Memphis
Newark
New York
Philadelphia
St. Louis

Attn: Nashville RA

Attn: Military Records
Center,
John Singleton

Tampa

From: Birmingham
Squad 6
Contact: ASAC J. Ronnie Webb, Ext. 0164

Approved by: SSA Jimmie L. Brown

Drafted By: Newton Jeffrey C

Case ID #: 286A-BH-46671 (Pending)

Title: UNSUB(S);
NEW WOMAN ALL WOMEN
HEALTH CARE CLINIC,
1001 17th Street South
Birmingham, Alabama;
1/29/98;
FACE - CIVIL RIGHTS

NCIC	SUPV.	OPR.	AGENT
ENTER			
MODIFY			
CLEAR			
CANCEL			
LOCATE			

DATE 1/30/98 NCIC # W053799K

ARMED AND DANGEROUS

Synopsis: Results of investigation to date in captioned matter; leads to be set for other Divisions.

Details: For the information of FBIHQ and all receiving Divisions, at approximately 7:25 a.m. on the morning of 1/28/98 an explosion occurred outside of the above captioned women's clinic which killed an off duty City of Birmingham, Alabama Police Officer and severely injured a clinic employee. The clinic, which is one of several women's health care clinics in the Birmingham metropolitan area which provides abortion services, was closed at the time of the blast and was not scheduled to open until 8:00 a.m.

Immediately following the blast, local, state and

EXHIBIT 1

1-SF-1
1-Mobile

286A-BH-46671-C-6

To: FBIHQ From: Birmingham
Re: 286A-BH-46671

federal law enforcement agencies responded to the scene and established a 1000 foot perimeter around the clinic. A careful search of the clinic's property and other surrounding areas for secondary explosive devises proved unavailing. The search was conducted by members of the Atlanta Bomb Task Force, FBI, Bureau of Alcohol, Tobacco and Firearms (BATF) as well as state and local agencies. As of this date, Birmingham has established a mobile command post at the blast site as well as a permanent command post inside the Division office. The permanent command post is currently being staffed round the clock by Birmingham personnel and will be so staffed within the near future.

Birmingham has established a Bomb Task Force with other law enforcement agencies in order to more efficiently conduct this investigation. Membership agencies cooperating in this task force along with Birmingham are the BATF, Birmingham Police Department (BPD), Jefferson County District Attorney's Office, United States Attorney's Office (USA), Alabama Bureau of Investigation (ABI) and the United States Marshal Service (USMS).

Preliminary investigation has determined that several individuals witnessed the explosion and the events immediately surrounding it. One witness in particular described an individual walking quickly away from the clinic immediately following the explosion. This witness thereafter follows this person for several blocks before the person was lost from sight. The person, whom was described as a white male adult approximately mid thirties in age, average height, medium build, with light colored hair, was subsequently spotted a few minutes later in the same vicinity in a gray small foreign make pickup truck. The witness obtained the license tag of this vehicle which was reported as being a North Carolina tag KND1117.

A search of the computerized data bases for the North Carolina Department of Motor Vehicles (NCDMV) revealed that license tag KND1117 is issued for a 1989 Nissan pickup truck, gray in color, registered to a ERIC ROBERT RUDOLPH at 30 Allen Avenue, Ashville, North Carolina. RUDOLPH is described by the NCDMV in his driver's license records as a white male adult, dob 9/19/66, 5'11" tall with blue eyes and brown hair. Further investigation into RUDOLPH revealed that he is currently residing at 1414 Partridge Creek Road, Topton, N.C. RUDOLPH's mother, PATRICIA MURPHY RUDOLPH, currently resides at 5320 53rd Avenue, Bradenton, Florida. NCDMV advised that they do not have a driver's license photo of RUDOLPH available for further investigative purposes.

In an attempt to locate a photograph of RUDOLPH, a 50 state driver's license search for other licenses for RUDOLPH revealed that RUDOLPH formerly had Tennessee license number 64490451 issued to him in 1989. A check with the St. Louis Military Records Center revealed that RUDOLPH was a former

To: FBIHQ From: Birmingham
Re: 286A-BH-46671

serviceman and that a photograph of him was available. A copy of RUDOLPH's service photograph was faxed to Birmingham 1/29/98.

Further investigation into the residence of 1414 Partridge Creek Road, Topton, N.C. reveal that the current resident of this address is a THOMAS WAYNE BRANHAM, a white male adult born 6/18/48. BRANHAM is known to the Atlanta Bomb Task Force as being a person who has been arrested on bomb related charges in the past. In 1986, BRANHAM was arrested by the BATF in Charlotte, N.C. for firearms and explosives charges. BATF also advised that BRANHAM is a member of the NORD DAVIS GROUP, an ultra right wing "Christian Patriot" organization operating out of Topton, N.C.

A check of telephone subscriber records revealed that telephone numbers (941) 758-1090 and (704) 321-3095 are assigned to PATRICIA MURPHY RUDOLPH and THOMAS BRANHAM, respectively.

On 1/29/98, a nationwide "BOLO" notice was entered into NCIC by Birmingham for RUDOLPH and his Nissan truck. To date, no sightings of RUDOLPH nor his vehicle have been made. On 1/30/98, the USA, Northern District of Alabama, obtained a Material Witness warrant for RUDOLPH. This warrant was signed by U.S. Magistrate Paul Greene and was entered into NCIC same date.

Birmingham has employed the RAPID START management system in the permanent command post in order to efficiently and effectively collate and disseminate all information of lead value in this investigation. Birmingham continues to pursue all logical leads generated by it's investigation to date and will continue to keep SIOC apprised of all significant developments as they occur.

To: FBIHQ From: [redacted]rmingham
Re: 286A-BH-46671

LEAD (s):

Set Lead 1:

CHARLOTTE

AT CHARLOTTE, N.C.

Charlotte will install pen registers, Trap and Trace devises and caller identification devices on telephone number (704) 321-1090 which is subscribed to by THOMAS WAYNE BRANHAM, 1414 Partridge Creek Road, Topton, N.C. as soon as feasible.

Set Lead 2:

AT TOPTON, N.C.

Charlotte will conduct discreet observations of the residence of ERIC ROBERT RUDOLPH and THOMAS WAYNE BRANHAM located at 1414 Partridge Creek Road, Topton, in an attempt to determine their presence there. Charlotte will also attempt to locate RUDOLPH's 1989 Nissan gray pickup truck bearing N.C. license KND1117 at that residence.

Set Lead 3:

AT HENDERSONVILLE, N.C.

Charlotte will locate and interview JOEL CHRISTIAN RUDOLPH, the brother of RUDOLPH, and MAURA JANE RHODES, the sister of RUDOLPH, at 601 Glenheath Drive, Hendersonville, (704) 891-8742, concerning any knowledge they may possess regarding the current whereabouts of their brother.

Set Lead 4:

COLUMBIA

AT LADSON, S.C.

Columbia will locate and interview DANIEL KERNEY RUDOLPH and CHRISTINE RUDOLPH, the brother and sister-in-law of RUDOLPH, at 108 Beverly Dr., Ladson, S.C., (803) 821-0571, concerning any information they may possess regarding the current whereabouts of RUDOLPH.

Set Lead 5:

LOUISVILLE

AT FORT THOMAS, KY

To: FBIHQ From: Birmingham
Re: 286A-BH-46671

Louisville will locate and interview DAMIAN THOMAS RUDOLPH and BETSY RUDOLPH, the brother and sister-in-law of RUDOLPH, at 235 Rosemont Avenue, Fort Thomas, KY, (606) 781-0698, regarding any information they may possess concerning the current whereabouts of RUDOLPH.

Set Lead 6:

MEMPHIS

AT NASHVILLE, TENNESSEE

Memphis will attempt to obtain a copy of the Tennessee driver's license photograph of ERIC ROBERT RUDOLPH which appears on Tennessee driver's license number 64490451. Memphis will coordinate with Birmingham arrangements in order to expeditiously transport this photograph to Birmingham.

Set Lead 7:

NEWARK

AT CAPE MAY, NJ

Newark will locate and interview JIM MURPHY, the brother of RUDOLPH, at 262 Pennsylvania Avenue, Cape May, NJ, (609) 349-8400, concerning any information he may possess regarding the current whereabouts of RUDOLPH.

Set Lead 8:

NEW YORK

AT NEW YORK CITY, NY

New York will locate and interview JAMIE MICHAEL RUDOLPH, 304 Bleecker St., NY, NY (212) 727-3827, regarding any information he may possess concerning the current whereabouts of his brother RUDOLPH.

Set Lead 9:

PHILADELPHIA

AT SWARTHMORE, PA

Philadelphia will locate and interview JOE MURPHY, the uncle of RUDOLPH, 833 Caldwell Rd., Swarthmore, PA (215) 382-6492, regarding any information he may possess regarding the current whereabouts of RUDOLPH.

To: FBIHQ From: Birmingham
Re: 286A-BH-46671

Set Lead 10:

ST. LOUIS

AT MILITARY RECORDS CENTER

St. Louis will expeditiously furnish to Birmingham the military photograph and copies of all pertinent records of ERIC ROBERT RUDOLPH for further investigative purposes.

Set Lead 11:

AT FLORISSANT, MO

St. Louis will locate and interview CHARLIE NEWMAN and PAT NEWMAN, the uncle and aunt of RUDOLPH, at 1090 Donelle, Florissant, MO (314) 838-5059, concerning any information they may possess regarding the whereabouts of RUDOLPH.

Set Lead 12:

TAMPA

AT BRADENTON, FLORIDA

Tampa will install pen registers, Trap and Trace and caller identification devices on telephone number (941) 758-1090 which is subscribed to by PATRICIA MURPHY RUDOLPH at 5320 53rd Avenue, Bradenton, Florida as soon as feasible.

Set Lead 13:

AT BRADENTON, FLORIDA

Tampa will locate and interview PATRICIA MURPHY RUDOLPH regarding any information she may possess regarding the current whereabouts of RUDOLPH.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

98 JAN 30 PM 2:02

N.D. OF ALABAMA

IN RE:	)	
GRAND JURY SUBPOENA FOR	)	
ERIC ROBERT RUDOLPH COMMENCING	)	
IN THE U. S. DISTRICT COURT	)	NO.
IN THE NORTHERN DISTRICT OF	)	
ALABAMA ON FEBRUARY 4, 1998	)	

AFFIDAVIT

The undersigned, Robert J. McLean, Assistant United States Attorney for the Northern District of Alabama, does swear and affirm as follows:

1. That the Grand Jury matter of Eric Robert Rudolph has been set for consideration before the Grand Jury meeting in Birmingham, Alabama, on FEBRUARY 4, 1998. This matter involves the investigation of Eric Robert Rudolph and others for charges of violation of use of a destructive device in the commission of a crime of violence, in violation of Title 18, United States Code, Section 924(c); use of a weapon of mass destruction, in violation of Title 18, United States Code, Section 2332a; destruction of a building by explosives, in violation of Title 18 United States Code, Section 844(i); damaging the property of a facility providing reproductive health services, in violation of Title 18 United States Code, Section 248(a)(3); and possession of an unregistered destructive device, in violation of Title 26 United States Code, Section 5861(d).

EXHIBIT 2

S.W. = Search Warrant

2. That the testimony of ERIC ROBERT RUDOLPH is material to the investigation of this matter in that his testimony would directly relate to the identities of participants and evidence of the aforesaid violations.

Source for Parag. 5 of Cal's Mini Storage S.W. Affidavit

3. On January 29, 1998, a bomb was detonated outside a reproductive health services clinic located at 1001 17th Street South, Birmingham, Alabama. A witness reported to agents of the Federal Bureau of Investigation that an individual he had earlier observed leaving the scene of the bombing, he later observed driving a grey Nissan pickup truck with North Carolina license plate number KND1117. Agents traced the license plate to a vehicle registered to Eric Robert Rudolph, whose last known address is in North Carolina. Agents have interviewed a witness who reported that he had seen Rudolph in this vehicle within the last 10 days. Numerous attempts to locate Rudolph at his last known address have proved fruitless and his whereabouts is unknown.

4. That your Affiant was informed on January 29 and 30, 1998, by Special Agent Larry Long, Federal Bureau of Investigation, that attempts have been made to locate ERIC ROBERT RUDOLPH in order to serve him with a Grand Jury subpoena directing him to be present in Birmingham, Alabama, on February 4, 1998, in order to comply with the subpoena.

5. That law enforcement agents have been unable to

locate ERIC ROBERT RUDOLPH in order to serve him with a subpoena to appear as directed at the Grand Jury on FEBRUARY 4, 1998, and that in the opinion of Larry Long, Special Agent, Federal Bureau of Investigation, ERIC ROBERT RUDOLPH is avoiding contact with law enforcement agents.

6. That it is essential and necessary to the aforesaid Grand Jury investigation that ERIC ROBERT RUDOLPH appear and testify before the Grand Jury as to matters within his knowledge.

Robert J. McLean
Assistant United States Attorney

Sworn to and subscribed before me on
this the 30th day of January 1998.

United States Magistrate Judge

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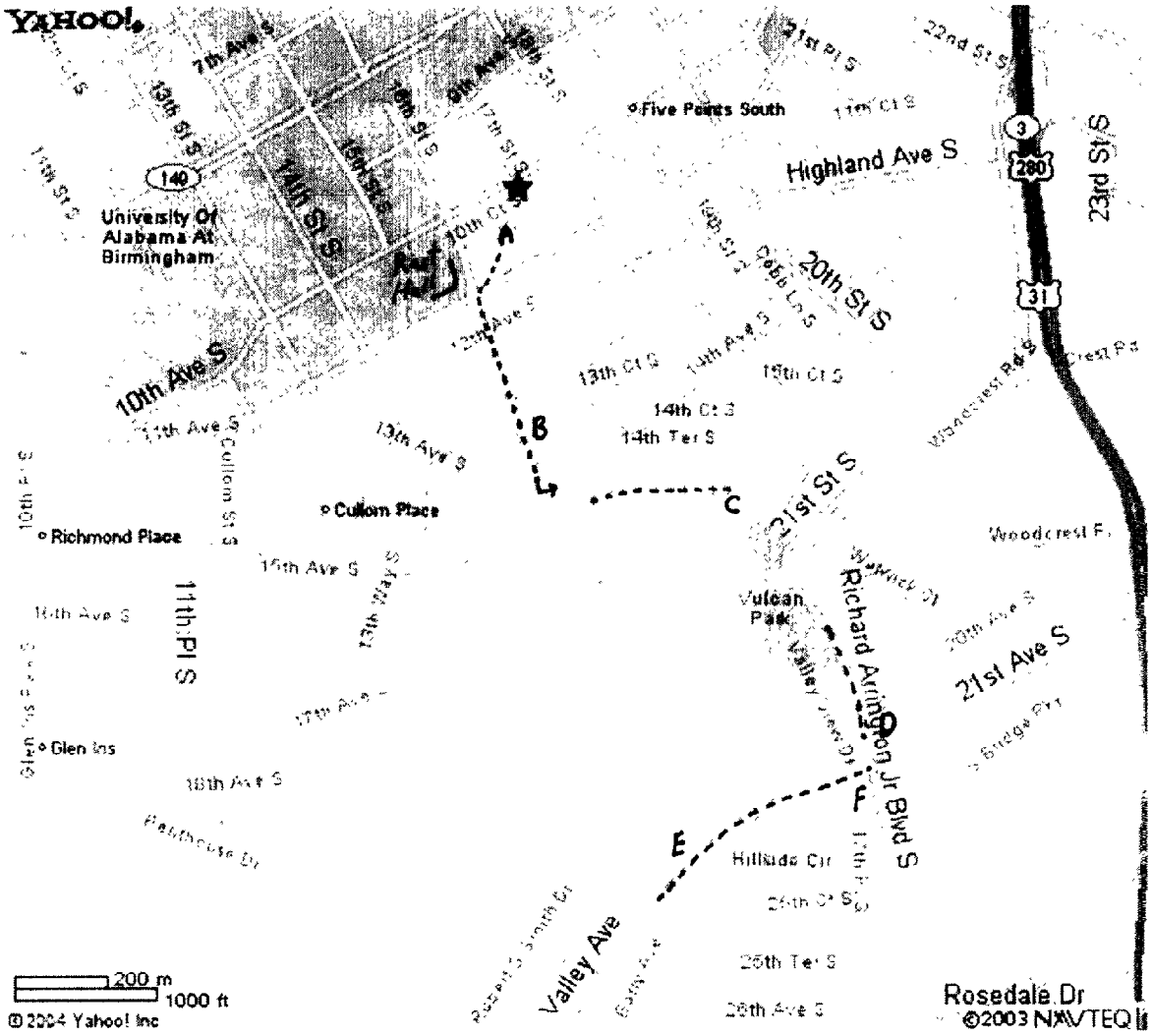

When using any driving directions or map, it's a good idea to do a reality check and make sure the road still exists, watch out for construction, and follow all traffic safety precautions. This is only to be used as an aid in planning.

EXHIBIT 5

Only the Westlaw citation is currently available.

United States District Court, S.D. Ohio, Western Division.

UNITED STATES of America, Plaintiff,
v.
Michael Paul WILLIAMS, and Spencer Eric Dugan, Defendants.

No. CR-3-97-0961, CR-3-97-0964.

June 5, 2000.

Robert Buckley Coughlin, Young Pryor Lynn & Jerardi--3, Dayton, for Spencer Eric Dugan, Bond: 10,000 10%, executed 210 Worley Avenue Trotwood, OH 45426, defendants.

David J Horne, United States Attorney's Offic--3, for U.S. Attorneys.

DECISION AND ENTRY OVERRULING MOTION TO SUPPRESS EVIDENCE OF DEFENDANT SPENCER ERIC DUGAN (DOC. # 112); DECISION AND ENTRY OVERRULING MOTION TO SUPPRESS EVIDENCE OF DEFENDANT MICHAEL PAUL WILLIAMS (DOC. # 114); CONFERENCE CALL SET

RICE, Chief J.

***1** Defendants Michael Paul Williams ("Williams") and Spencer Eric Dugan ("Dugan") are each charged in the Superseding Indictment (Doc. # 23) with one count of conspiring to distribute and to possess with intent to distribute in excess of 100 kilograms of marijuana and one count of possessing with intent to distribute in excess of 100 kilograms of marijuana. This case is now before the Court on the Motions to Suppress Evidence filed by Williams and Dugan. *See* Doc. # 112 (Dugan) and Doc. # 114 (Williams). [FN1] With those motions, the Defendants request that the Court suppress the physical evidence which was seized, when a 1984 Chevrolet pick-up truck and a large parcel in the bed of that vehicle were searched on December 2, 1997, pursuant to a search warrant issued by United States Magistrate Judge Michael Merz. Those Defendants also request that the Court suppress any evidence seized from their persons, after being arrested on that date. In addition, Williams asks for the suppression of his statements to officers on the day of his arrest. [FN2] On July 20, 1998, August 13, 1998, and September 4, 1998, this Court conducted an oral and evidentiary hearing on these motions, as well as on other motions seeking suppression of evidence filed by some of his Co-Defendants. At the conclusion of that hearing, the Court established a briefing schedule. *See* Doc. # 152. Dugan has filed a Post-Hearing Memorandum (Doc. # 162), to which the Government has responded. *See* Doc. # 164. Williams' Post-Hearing Memorandum (Doc. # 163) merely incorporates the arguments contained in that filed by Dugan. [FN3]

FN1. A number of other motions filed by Williams are also pending, to wit: Motion for Notice of Other Evidence the Government Intends to Introduce at Trial (Doc. # 82); Motion for Production of Jencks Material and for Preservation of Agents' Notes (Doc. # 83); Request for Discovery (Doc. # 94); and Request for Production of Exculpatory Evidence (Doc. # 95). Dugan has also filed additional motions, to wit: Motion for Notice of Intention to Use Evidence (Doc. # 77); Motion for Pretrial Notice of Other Evidence (Doc. # 78); Motion for Production of Exculpatory Evidence (Doc. # 80); and Request for Discovery (Doc. # 81). The Court will rule upon those motions by separate entry. Parenthetically, Christopher Tincher, a Co-Defendant of Williams and Dugan, has filed a motion, requesting that this Court dismiss this prosecution, because of non-compliance with the Speedy Trial Act.

See Doc. # 239. This Court has this date overruled that motion. It is axiomatic that, when multiple defendants are charged together and severance has not been granted, only one speedy trial clock governs the action. *See* 18 U.S.C. § 3161(h)(7); *United States v. Snelling*, 961 F.2d 93, 95 (6th Cir.1991); *United States v. Culpepper*, 898 F.2d 65, 66 (6th Cir.), *cert. denied*, 498 U.S. 856 (1990). Since severance has not been granted in this case, the rights of Williams and Dugan under the Speedy Trial Act have not been violated.

FN2. In his motion, Williams argued that his statements should be suppressed, both because the officers questioning him had failed to provide the warnings required under *Miranda v. Arizona*, 384 U.S. 436 (1966), and because those statements were the fruit of his illegal arrest. In his Post-Hearing Memoranda, Williams concedes that the officers did not violate *Miranda* and relies solely upon the fruit-of-the-poisonous-tree doctrine to support his requests that his statements be suppressed. *See* Doc. # 163 at 1. In his motion, Dugan asked that his statements be suppressed; however, in his Post-Hearing Memorandum, he indicates that his request in that regard is moot. *See* Doc. # 162 at 2.

FN3. The Government has not filed a memorandum in response to Williams' Post-Hearing Memorandum.

On December 1, 1997, Detective Kevin Bollinger ("Bollinger") of the Dayton Police Department received a telephone call from Officer Jesus Veliz ("Veliz"), an El Paso, Texas, police officer assigned to the Drug Enforcement Administration's ("DEA") El Paso Airport Task Force. [FN4] Veliz informed Bollinger that he had learned that an individual named Luis Cordova ("Cordova") had earlier that day used cash to purchase a round-trip airline ticket to fly from El Paso to Dayton on that day and to return the following day. According to Veliz, Cordova was traveling on American Airlines, leaving El Paso at 4:30 p.m., changing planes in Dallas, and arriving in Dayton at 11:31 p.m. Veliz also told Bollinger that Cordova intended to spend that night at the Ramada Inn, located at 4079 Little York Road. After he had confirmed with American Airlines that Cordova would be arriving in Dayton from El Paso at 11:31 p.m. that evening, Bollinger and Detective Lubonovic ("Lubonovic") of the Dayton Police Department went to the Dayton International Airport to begin surveillance for Cordova. They observed an individual, who was later identified as Cordova, exit the American Airlines' flight from Dallas. After stopping to make a telephone call, Cordova left the airport and entered a taxicab which took him to the Ramada Inn, where he checked into Room 227. They continued surveillance until 3:00 a.m., on December 2nd.

FN4. Since the 1984 Chevrolet pick-up truck and the parcel in its bed were searched pursuant to a search warrant, the Court derives the following recitation of facts from the affidavit which DEA Special Agent Peter Garcia executed in order to obtain that warrant.

***2** At approximately noon on December 2nd, Ramada Inn personnel told Bollinger that Cordova had made a local telephone call from his room. Bollinger was able to learn that Cordova had called the Emery Freight facility located at the Dayton International Airport. Employees of Emery told Bollinger that they had received a number of telephone calls concerning a parcel that had been shipped from El Paso to 18 Woodman Road, Dayton, Ohio, a non-existent address. At approximately 1:00 p.m., Bollinger went the Emery facility, where he was shown the parcel, which consisted of three brown cardboard boxes, each measuring 18" x 36" x 26". The three cardboard boxes had been shrinkwrapped and banded together. With the permission of Emory personnel, Bollinger subjected the parcel to a "sniff" by Pete, his drug-detection canine, trained to detect the odor of marijuana, cocaine, heroin, hashish and the derivatives of those controlled substances. Pete alerted on the parcel, indicating the presence of the odor of a controlled substance.

At about the same time, Lubonovic observed a 1984 Chevrolet pick-up truck drive into the Ramada Inn. The three individuals in that vehicle were later identified as

Williams, Dugan and Eric Alvarez ("Alvarez"). Detective Oliver Logan ("Logan"), who was conducting surveillance on Cordova's room, observed Alvarez enter that room and leave it about one minute later, carrying a piece of paper. Alvarez then returned to the 1984 Chevrolet pick-up truck, which was driven away from the Ramada Inn.

At approximately 1:15 p.m., Sergeant Randall Warren ("Warren") of the Dayton Police Department observed the 1984 Chevrolet pick-up truck, with Williams, Alvarez and Dugan still inside, being driven into the Emery facility at the Dayton International Airport. Williams and Alvarez got out of the vehicle and entered the building. After a brief conversation with an Emery clerk, they left and reentered the 1984 Chevrolet pick-up truck, which was driven away. After Williams and Alvarez left the building, Emery personnel told Bollinger, who had apparently remained at the Emery facility, that there was a shipping charge for the parcel. About one hour later, Williams, Dugan and Alvarez returned in the 1984 Chevrolet pick-up truck to the Emery facility. Once again, Williams and Alvarez entered the building. Bollinger observed Williams hand a faxed copy of the original shipper's airbill for the parcel to a clerk and Alvarez pay the clerk for the shipping charges. Williams then signed for the parcel, and it was loaded onto the bed of the 1984 Chevrolet pick-up truck by Emery personnel using a forklift. As Williams, Dugan and Alvarez drove away from the Emery facility in that vehicle, they were stopped by Officer Dave Brener of the Dayton Airport Police.

Special Agent Peter Garcia ("Garcia") of the DEA then executed an affidavit, setting forth the foregoing information, with which he obtained a search warrant from Magistrate Judge Michael Merz, authorizing law enforcement personnel to search the 1984 Chevrolet pick-up truck and the parcel in its bed. When the officers executed that warrant, they discovered that the parcel contained approximately 539 pounds of marijuana. The three occupants were arrested. When Dugan was being processed at the Federal Building, DEA Special Agent Mark Murtha ("Murtha") seized a marijuana pipe and miscellaneous papers from him. Transcript of September 4, 1998 Hearing (Doc. # 157) at 8. At the same time, Murtha searched Williams and seized miscellaneous papers from him. *Id.*

***3** In his Post-Hearing Memorandum, Dugan argues that the legality of the stop of the 1984 Chevrolet pick-up truck, the search of that vehicle and the parcel in its bed, as well as the search of him at the Federal Building, are all dependant upon Pete's alert on that parcel. *See* Doc. # 162 at 2-3. In other words, without expressly so stating, Dugan contends that the remainder of the information contained in Garcia's affidavit, disregarding the alert by Pete, is insufficient to establish the existence of probable cause to believe that the vehicle or the parcel in its bed contained controlled substances. Even though the Government has argued to the contrary, this Court initially proceeds from the premise that the information in Garcia's affidavit pertaining to the alert by the drug-detection dog Pete is necessary to establish probable cause. Although Dugan concedes that an alert by properly trained and reliable drug-detection canine can support the existence of probable cause (Doc. # 162 at 3), he mounts a two-pronged attack on the information in Garcia's affidavit concerning Pete. [FN5] Initially, Dugan argues that the affidavit did not contain sufficient information concerning the dog's training and reliability to establish probable cause. Alternatively, he contends that Garcia violated the rule established by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154 (1978), by omitting from his affidavit information that Pete had, in the past, alerted on objects where narcotics were not found and that adequate records pertaining to Pete's unsuccessful alerts had not been maintained. As a means of analysis, the Court will initially review the general principles which are applicable to the instant motions, following which it will turn to Dugan's alternative arguments, in which Williams has joined.

> FN5. If this Court agrees with the Defendants' attacks on the information in Garcia's affidavit concerning Pete, it will address the Government's argument that Garcia's affidavit established probable cause, even in the absence of the information concerning the alert on the parcel by that canine.

In *United States v. Smith*, 182 F.3d 473 (6th Cir.1999), the Sixth Circuit restated certain

fundamental principles that a court must apply when a defendant argues that evidence, seized upon the execution of a search warrant, must be suppressed because the supporting affidavit did not establish the existence of probable cause:

> The Fourth Amendment, which states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation," U.S. CONST. amend. IV, requires that probable cause be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out federal crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). In order for a magistrate to be able to perform his official function, the affidavit must contain adequate supporting facts about the underlying circumstances to show that probable cause exists for the issuance of the warrant. *Whiteley v. Warden*, 401 U.S. 560, 564 (1971). Probable cause is defined as "reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion." *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir.1990). It requires "only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n. 13 (1983). A warrant must be upheld as long as the magistrate had a "substantial basis for ... conclud [ing] that a search would uncover evidence of wrongdoing...." *Id.* at 236. *See also United States v. Finch*, 998 F.2d 349, 352 (6th Cir.1993).

***4** *Id.* at 476-77. In *Illinois v. Gates*, 462 U.S. 213, 230 (1983), the Supreme Court stressed that the existence of probable cause must be determined from the totality of the circumstances. When determining whether Garcia's affidavit demonstrates that probable cause existed, this Court must examine the totality of those circumstances in a "realistic and commonsense fashion." *United States v. Van Shutters*, 163 F.3d 331, 336 (6th Cir.1998). Of course, this Court also must afford great deference to the determination of probable cause made by Judge Merz who issued the search warrant. *United States v. Allen*,--F.3d--, 2000 WL 547599 (6th Cir.2000) (*en banc*); *United States v. Akram*, 165 F.3d 452, 456 (6th Cir.1999). Where, as in the present case, oral testimony was not presented to the issuing magistrate, the existence of probable cause to support that warrant must be ascertained exclusively from the four corners of the affidavit. *See e.g., Whiteley v. Warden*, 401 U.S. 560, 565 n. 8 (1971); *United States v. Vigeant*, 176 F.3d 565, 569 (1st Cir.1999); *United States v. Etheridge*, 165 F.3d 655, 656 (8th Cir.1999); *United States v. Weaver*, 99 F.3d 1372, 1377 (6th Cir.1996).

With respect to the argument that Garcia's affidavit did not adequately set forth the training and reliability of Pete and, thus, failed to establish probable cause to believe that the parcel in the bed of the 1984 Chevrolet pick-up truck contained controlled substances, the Sixth Circuit has addressed and rejected a similar argument:

> A positive reaction by a properly trained narcotics dog can establish probable cause for the presence of controlled substances. *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir.1994). However, for such a reaction to support a determination of probable cause, the training and reliability of the dog must be established. *Id.*
>
> We find that the information contained in the affidavit in this case was sufficient to establish the training and reliability of the drug-detecting dog. The affidavit's references to the dog as a "drug sniffing or drug detecting dog" reasonably implied that the dog was a "trained narcotics dog." Further, the affidavit stated that the dog was trained and qualified to conduct narcotics investigations.
>
> Nonetheless, defendant contends that the affidavit in support of the search warrant was inadequate because it failed to establish the dog's reliability and credibility. Contrary to defendant's suggestion, to establish probable cause, the affidavit need not describe the particulars of the dog's training. Instead, the affidavit's accounting of the dog sniff indicating the presence of controlled substances and its reference to the dog's training in narcotics investigations was sufficient to establish the dog's training and reliability. *See United States v. Daniel*, 982 F.2d 146, 151 n. 7 (5th Cir.1993) (rejecting defendant's argument that an affidavit must show how reliable a drug-detecting dog has been in the past in order to establish probable cause); *United States v. Venema*, 563 F.2d 1003, 1007 (10th Cir.1977) (stating that an affidavit in support of a search warrant need not describe the drug-detecting dog's

educational background and general qualifications with specificity to establish probable cause). Therefore, after examining the affidavit in support of the search warrant, we agree with the issuing judge's and the District Court's conclusions that the affidavit does provide a substantial basis to support a finding of probable cause. Accordingly, the District Court's denial of defendant's motion to suppress the evidence seized during the search of defendant's car was not erroneous.

*5 *United States v. Berry*, 90 F.3d 148, 153-54 (6th Cir.), *cert. denied*, 519 U.S. 999 (1996). *Accord, United States v. Sundby*, 186 F.3d 873 (8th Cir.1999); *United States v. Kennedy*, 131 F.3d 1371 (10th Cir.1997), *cert. denied*, 525 U.S. 863 (1998).

Herein, Garcia's affidavit described the training and reliability of Pete, as follows:

10. Canine "Pete" is a ten year old mixed breed dog who has been certified with Det. Bollinger as a narcotic detection dog team by the U.S. Customs Training Center on December 21, 1989, and have [sic] been in the field since that time. "Pete" is certified to detect the odor of marijuana, cocaine, heroin and hashish, or any derivative of same. "Pete" has also successfully alerted in over one hundred and eighty (180) actual cases where narcotics or narcotics related currency have been found in the Dayton, Ohio[,] and El Paso, Texas [,] areas. Det. Bollinger and "Pete" were last re-certified at the U.S. Customs Canine Training Center in December[.] 1996.

Government Ex. 4 at ¶ 10. Thus, Garcia provided at least as much information as that which the Sixth Circuit concluded was sufficient to establish a dog's training and reliability in *Berry*. Garcia expressly stated that Pete and Bollinger had been initially certified in 1989, and that they had been re-certified in December, 1996, approximately one year before the incidents in question. Moreover, he indicated that Pete had successfully alerted in 180 cases. Therefore, this Court concludes that Garcia's affidavit adequately set forth Pete's training and reliability such as to support the existence of probable cause to believe that the parcel contained controlled substances. [FN6] Accordingly, based upon the foregoing, the Court rejects Dugan's argument, in which Williams has joined, that Garcia's affidavit failed to establish probable cause, because it did not adequately demonstrate that Pete was trained and reliable. [FN7]

FN6. Parenthetically, neither Dugan nor Williams has argued that the mere fact that the 1984 Chevrolet pick-up truck was carrying a parcel, which officers had probable cause to search, was insufficient to establish probable cause to search the vehicle itself. The Court assumes that those Defendants have not made such an argument, because there is no indication that any evidence was seized from that vehicle.

FN7. Dugan has placed primary reliance on *United States v. Florez*, 871 F.Supp. 1411 (D.N.M.1994), wherein the court granted the defendant's motion to suppress evidence, because the Government had failed to demonstrate that a drug-detection dog was reliable. Simply stated, this Court is obligated to follow the decisions of the Sixth Circuit. In *Berry, supra*, at 9, that court decided on indistinguishable facts that an affidavit established that a drug-detection dog was trained and reliable.

As is indicated, Dugan argues, in the alternative, that Garcia violated *Franks*, by omitting from his affidavit the fact that Pete had, in the past, alerted on items which did not contain controlled substances and by failing to inform Judge Merz that records pertaining to those instances had not been maintained. In *Franks*, the Supreme Court established the proposition that evidence seized as a result of the execution of a search warrant may be suppressed, if the warrant was obtained on the basis of an affidavit which contained falsehoods. The *Franks* Court held:

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is

established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

*6 438 U.S. at 155-56. Courts have applied the principles established in *Franks* to instances in which an officer has omitted information from his affidavit, rather than including falsehoods therein. With respect to such omissions, the Sixth Circuit has written:

> Although material omissions are not immune from inquiry under *Franks*, we have recognized that an affidavit which omits potentially exculpatory information is less likely to present a question of impermissible official conduct than one which affirmatively includes false information. *United States v. Martin*, 920 F.2d 393, 398 (6th Cir.1990). This is so because an allegation of omission " 'potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant's benefit." ' *Id.* (quoting *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir.1990)). If the defendant does succeed in making a preliminary showing that the government affiant engaged in "deliberate falsehood" or "reckless disregard for the truth" in omitting information from the affidavit, the court must then consider the affidavit including the omitted portions and determine whether probable cause still exists. *United States v. Bonds*, 12 F.3d 540, 568 n. 26 (6th Cir.1993).

United States v. Atkin, 107 F.3d 1213, 1217 (6th Cir.1997). In *Mays v. City of Dayton*, 134 F.3d 809, 815 (6th Cir.), *cert. denied*, 118 S.Ct. 2352 (1998), the Sixth Circuit stressed that the omission of material information from an affidavit will result in the suppression of evidence "only in rare instances."

Herein, during the suppression hearing, Bollinger testified that, over the nine years that he has handled Pete, the dog had, from seven to ten times, alerted on an item, with no controlled substances being found in the ensuing search. [FN8] Transcript of August 13, 1998 Hearing (Doc. # 156) at 90. Bollinger also testified that he did not maintain records concerning those seven to ten instances. *Id.* at 92, 98. In *Kennedy, supra,* the Tenth Circuit addressed and rejected an argument based upon *Franks,* similar to that put forth by the Defendants herein. Therein, officers, executing a search warrant, seized over 50 pounds of marijuana from two suitcases the defendant was carrying. That search warrant had been obtained on the basis of an affidavit executed by DEA Special Agent Small, wherein he indicated that Bobo, a drug-detection dog, had alerted on the suitcases. After being charged, the defendant moved to suppress the marijuana seized from the suitcases, arguing that Small had violated *Franks* by omitting information from his affidavit. In particular, the defendant asserted that Small should have included in his affidavit information that, in the months preceding the incident in question, Bobo had falsely alerted in 16 of 56 cases, and, further, that Bobo's handler had failed to keep accurate records. The District Court agreed with the defendant and suppressed the marijuana seized from the suitcases. Upon the Government's appeal, the Tenth Circuit reversed, concluding that the omitted information was not material and that, therefore, *Franks* had not been violated. In that regard, the Tenth Circuit wrote:

> FN8. Throughout his Post-Hearing Memorandum (Doc. # 162), Dugan incorrectly refers to Pete's handler as Detective Mauch. Although Mauch was present when the events in question occurred, Bollinger was the drug-detection dog's handler.

*7 Even if Small had presented to the magistrate judge all of the facts the district court felt should have been included in his affidavit, a reasonable magistrate judge still would have found probable cause to issue the search warrant. A magistrate judge's task in determining whether probable cause exists to support a search warrant "is simply to make a practical, common-sense decision whether, given all the facts and circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The standard for probable cause only requires that

the magistrate had a " 'substantial basis for ... conclud [ing]' that a search would uncover evidence of wrongdoing." *Id.* at 236 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

* * *

Although [the handler's] poor records might justify a further examination of Bobo's performance in the context of a motion to suppress, the further investigation actually undertaken by the district court produced evidence that Bobo in fact consistently performed well enough to support a probable cause finding. None of the additional information that the district court thought should have been included in the warrant application would have suggested that Bobo was unreliable. In fact, the additional information suggested the opposite. The evidence indicated that Bobo correctly alerted 71% of the time in those instances where records were kept and that on those occasions where Bobo worked with Small, the dog had at least an 80% accuracy rate. We find that a 70-80% success rate meets the liberal standard for probable cause established in *Gates*. Kennedy argues that the magistrate judge would have no real basis on which to base a probable cause determination because the records that did exist were inadequate. We disagree. According to Kennedy, [the handler] should have admitted that he did not keep proper records, did not adopt [the] recommended training regimen, and could not provide "even close to reliable statistics about Bobo's actual performance." However, Small also would have been able to inform the magistrate judge that Bobo had an 80% success rate working with Small and a 71% success rate based on the records that were kept by other officers. We conclude that this information would not have altered the magistrate judge's probable cause determination.

Id at 1377-78.

This Court agrees with the result reached by the Tenth Circuit in *Kennedy* and the rationale employed therein. Herein, the evidence is that Pete had a success rate of approximately 95%, alerting successfully 180 times and unsuccessfully 7-10 times. Therefore, this Court concludes that information about the 7-10 instances in which Pete alerted and controlled substances were not found would not have altered Judge Merz' probable cause determination, nor would information about to failure to maintain records concerning Pete's unsuccessful alerts have impacted upon that determination.

***8** In sum, this Court concludes that Garcia's affidavit established Pete's training and reliability and that, therefore, it demonstrated the existence of probable cause to believe that the parcel in the bed of the 1984 Chevrolet pick-up truck contained controlled substances. In addition, Garcia did not violate *Franks* by omitting material information from his affidavit. Accordingly, based upon the foregoing, the Court overrules the Motions to Suppress Evidence filed by Williams and Dugan. *See* Doc. # 112 (Dugan) and Doc. # 114 (Williams).

Counsel listed below will take note that the Court has scheduled a telephone conference call on Monday, June 12, 2000, at 5:15 p.m., for the purpose of selecting a date for the trial of this prosecution.

2000 WL 979997 (S.D.Ohio)

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Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

UNITED STATES of America,
v.
Ana Margarita Mejia CORTEZ and Maria Luz Azucar, Defendants.

No. 95 CR. 275 (RPP).

July 18, 1995.

Mary Jo White, U.S. Atty. S.D. New York, New York City by Vernon Broderick, for U.S.

John Byrnes, New York City, for defendant Ana Margarita Mejia Cortez.

Joel Cohen, New York City, for defendant Maria Luz Azucar.

OPINION AND ORDER

ROBERT P. PATTERSON, JR., District Judge.

*1 Defendant Ana Margarita Mejia Cortez ("Cortez") moves pursuant to Fed.R.Crim.P. 12 for (1) suppression of statements made to law enforcement officers or a hearing on this motion, and (2) a hearing to determine the reliability of the drug detection canine whose alleged alert led to a search of luggage in her custody. Defendant Maria Luz Azucar ("Azucar") moves for the suppression of her statements made to law enforcement officers and joins in the request by Cortez for a hearing to determine the reliability of the canine narcotics alert.

Background

On March 13, 1995 an agent based in the Albuquerque, New Mexico Drug Enforcement Administration ("DEA") office informed the DEA office in Kansas City, Missouri that he had identified as "suspicious" three black bags; that on one of the bags he had observed a name tag reading "Come Luz"; that the bags were in the baggage compartment of an Amtrak train travelling from Los Angeles to New York; that "the bags had a strange odor to them"; and that he suggested a canine trained in narcotics detection be used to determine whether the bags contained drugs. Broderick Aff. dated July 5, 1995 at Ex. A (Complaint), ¶ 2(a), Ex. C (Search Warrant Application), page 1. When the train arrived in Kansas City on March 14, 1995 a canine trained to identify narcotics was walked through the train's baggage compartment, and the dog alerted to the three bags by scratching at them. *Id.* ¶ 2(b). The detective walking the canine through the baggage compartment "could smell an odd odor emanating from the bags," and on one of the bags he observed a label bearing the name "Come Luz." Search Warrant Application at 2.

A search warrant was issued by a judge in Jackson County, Missouri on March 14, 1995, *id.*, and a search of the three bags resulted in the seizure of 15 kilograms of a white powdery substance which field-tested positive for the presence of cocaine. Complaint ¶ 2(c). The packages containing the powdery substance were replaced with similar-appearing packages, and the three bags were placed in the baggage claim area at the New York destination when the train from Los Angeles arrived. *Id.* ¶ 2(d) According to the Complaint, Cortez claimed the three bags, and she was subsequently assisted in carrying the bags by Azucar. *Id.* ¶ 2(e).

After Azucar and Cortez left the New York train station, two DEA agents approached them and identified themselves. *Id.* The DEA agents asked to see Cortez's ticket, and she allegedly showed them a ticket for two passengers in the name "L. Gomez." *Id.* When Cortez was asked by the agents if the bags belonged to her, she allegedly responded that they did, and the Defendants were arrested. *Id.* According to the

Complaint, a search of Azucar produced a train passenger receipt for two tickets from Los Angeles to New York in the name of "L. Gomez," and Cortez was found to possess keys for the three black bags. *Id.* ¶ 2(f).

*2 The Indictment filed March 30, 1995 charges both Azucar and Cortez with two counts of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine. 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A); 18 U.S.C. § 2.

Discussion

I. *Hearings to Suppress Statements*

Defendants both move for suppression of their post-arrest statements, or in the alternative for a hearing on their motions. The Government consents to a hearing on this motion by Azucar, but argues that Cortez has not raised an issue of fact as to whether she was read her *Miranda* rights.

Cortez affirms that "I do not recall any of the officers informing me of these *Miranda* rights or knowing of these rights on March 15, 1995." Cortez Aff. dated June 16, 1995 ¶ 6. Amtrak Police Officer Iris Ramos and DEA Special Agent Todd Shea both affirm that Cortez was advised of her *Miranda* rights in Spanish by Officer Ramos, and that Cortez acknowledged that she understood those rights. Ramos Aff. dated July 5, 1995 ¶ 2; Shea Aff. dated July 10, 1995 ¶ 2. Cortez's statement that she does not recall receiving such warnings, since it is made on personal knowledge, constitutes the equivalent of a denial. Accordingly, Cortez has raised a factual issue as to whether she was provided with *Miranda* warnings, and a hearing is ordered on her motion to suppress statements made to law enforcement officials. *Cf. United States v. Gregory*, 611 F.Supp. 1033, 1044 (S.D.N.Y.1985) (Weinfeld, J.) (defendant did not provide affidavit based on personal knowledge and thus failed to raise factual issue requiring suppression hearing); *United States v. Munoz*, 751 F.Supp. 1109, 1113-14 (S.D.N.Y.1990) (same). [FN1]

II. *Hearing on Canine Alert Reliability*

Cortez argues that insufficient information was provided in the Search Warrant Application as to the reliability of the canine which alerted to the bags in Kansas City, and that a hearing is needed to determine the dog's training and record for accuracy in identifying narcotics.

A. *Standing Requirement*

The Government argues that a hearing on the reliability of the canine sniff is not required since the Defendants' affidavits do not assert a privacy interest in the baggage. However, according to the Complaint, when the DEA Agents approached Azucar and Cortez at the train station in New York they "asked Cortez if the bags belonged to her and she replied ... that they did." Complaint ¶ 2(e). Since Cortez is not available to reassert this statement, the Court will assume that she has raised a privacy interest in the bags and violation of her Fourth Amendment rights therein.

B. *Information Required for Canine Reliability*

Cortez asserts that a hearing to determine the reliability of the drug detection canine used in Kansas City is necessary since some courts have indicated that information regarding a dog's training and reliability is necessary for making a probable cause determination. However, the cases cited by Cortez involve either (1) a warrant application where no information whatsoever was provided as to the dog's reliability, *see United States v. $67,220*, 957 F.2d 280, 285 (6th Cir.1992) (canine alert evidence "probative but weak" where "no indication in the record [showed] the trustworthiness of this particular dog"); (2) a seizure without a search warrant, *United States v. Florez*, 871 F.Supp. 1411, 1420-24 (D.N.M.1994) ("a review of well kept records, testimony of the dog's handler and corroborating circumstances when necessary" among factors for establishing reliability of dog's alert, and warrantless search relying solely on alert of dog not shown to be reliable lacked probable cause); or (3) statements but not holdings by courts which expressed a generalized need for data on canine reliability, *see United States v. Ludwig*, 10 F.3d 1523, 1527-28 (10th Cir.1993) ("dog alert might not give probable cause if the particular dog had a poor accuracy record"); *United States v. Brown*,

731 F.2d 1491, 1492 n. 1 (noting that although Supreme Court assumed dog tests are reliable, false "result of the test in this case should perhaps give us pause before making that assumption"), *modified on other grounds*, 743 F.2d 1505, (11th Cir.1984); *United States v. Spetz*, 721 F.2d 1457, 1464-65 (9th Cir.1983) (validly conducted dog sniff supplies probable cause "only if sufficient reliability is established by the application for the warrant"), *overruled on other grounds sub nom United States v. Bagley*, 765 F.2d 836 (9th Cir.1985), *cert. denied*, 475 U.S. 1023 (1986).

*3 The Government cites decisions in which courts indicated that a specific record of an alerting dog's prior accuracy was not required. *See United States v. Glover*, 957 F.2d 1004, 1013 (2d Cir.1992) ("hit" by "narcotics dog" provided probable cause for search warrant, citing *United States v. Waltzer*, 682 F.2d 370, 372-73 [2d Cir.1982], *cert. denied*, 463 U.S. 1210 [1983]); *United States v. Johnson*, 660 F.2d 21, 22 (2d Cir.1981) (sufficient probable cause provided by "specially trained" dog's reaction and other unspecified factors indicating presence of drugs); *United States v. Knox*, 839 F.2d 285, 294 n. 4 (6th Cir.1988) (positive reaction by "Narcotics Unit dog alone" provides probable cause), *cert denied*, 490 U.S. 1019 (1989); *see also United States v. Dillon*, 810 F.Supp. 57, 61 (W.D.N.Y.1992) ("formal recitation of a police dog's *curriculum vitae* unnecessary in the context of ordinary warrant applications" [citation omitted]).

The Search Warrant Application in the instant case provided the following information regarding the "narcotic[s] trained detection K-9 'Cole,' " the dog used in Kansas City to sniff the suspicious bags for drugs:

> "Cole" is a[n] eight year [old], yellow Labrador who.... has been responsible for numerous narcotics seizures at the Amtrak Train Station. In 1995 "Cole" has alerted on twenty-two different occasions which have resulted in 234 pounds of marijuana, 5.4 pounds of Methamphetamine, 32 ounces of PCP (Phencyclidine) and 28.6 pounds of cocaine [being seized].

Search Warrant Application at 2. The Search Warrant Application supplied adequate information to show that Cole possessed training and skill in identifying narcotics, and provided grounds for a reasonable belief that a crime was being committed. *Johnson*, 660 F.2d at 23. Although Cole's prior record of verified and false alerts would have provided a more accurate basis for making the probable cause determination, *see Florez*, 871 F.Supp. at 1417-21, this criticism of the Search Warrant Application is insufficient to overcome the "great deference" to be accorded probable cause determinations by magistrates and judges who issue warrants. *See United States v. Jakobetz*, 955 F.2d 786, 803 (2d Cir.) ("any doubts should be resolved in favor of upholding the warrant[ ]" [citation omitted]), *cert. denied*, 113 S.Ct. 104 (1992). Furthermore, even if the warrant was unsupported by probable cause, clear legal authority requiring that a record of Cole's prior hits and misses be included in the Search Warrant Application is lacking, and thus such a warrant could be relied upon in objective good faith since "a reasonably well trained officer would [not] have known that the search was illegal despite the magistrate's authorization." *United States v. Moore*, 968 F.2d 216, 222 (2d Cir.) (citing *United States v. Leon*, 468 U.S. 897, 922 [1984]), *cert. denied*, 113 S.Ct. 480 (1992). Defendants' motion for a hearing to determine the reliability of the drug detection dog used in Kansas City is denied.

Conclusion

*4 Defendants' motions for a hearing on suppression of their post-arrest statements are granted, but their motions for a hearing on the reliability of the canine drug detection dog are denied.

IT IS SO ORDERED.

> FN1. The Government cites *United States v. Love*, 859 F.Supp. 725, 735 (S.D.N.Y.), *aff'd mem.*, 41 F.3d 1501 (2d Cir.1994), in which the district court held that the defendant's "inability to recollect whether he was read his *Miranda* rights does not require suppression of his post-arrest statements." However, the court in *Love* did not hold that an affidavit stating that the defendant does not recollect such a warning fails to raise a factual issue. Also, the decision addressed only the suppression issue and not whether a hearing

was required. *Id.* at 734.

1995 WL 422029 (S.D.N.Y.)

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